No. 06-1195

IN THE

Supreme Court of the United States

LAKHDAR BOUMEDIENE, *et al.*,

Petitioners,

v.

GEORGE W. BUSH, *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

MOTION FOR LEAVE TO FILE SUPPLEMENTAL BRIEF AND SUPPLEMENTAL BRIEF FOR THE *BOUMEDIENE* PETITIONERS

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MOTION FOR LEAVE TO FILE SUPPLEMENTAL BRIEF FOR THE *BOUMEDIENE* PETITIONERS

Pursuant to Rules 25.5 and 25.6 of the Rules of this Court, Petitioners respectfully seek leave to file the attached supplemental brief addressing two cases raised by the Solicitor General at oral argument, but not previously relied upon by the government or any of its supporting amici in this Court or in the courts below.

Respectfully submitted.

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SUPPLEMENTAL BRIEF FOR THE *BOUMEDIENE* PETITIONERS

At oral argument, the Solicitor General referred to two World War II-era British cases—*Liversidge* v. *Anderson*, [1942] A.C. 206 (H.L. 1941), and *Greene* v. *Secretary of State for Home Affairs*, [1942] A.C. 284 (H.L. 1941)—as standing for the proposition that common law habeas courts did not look beyond the factual assertions in the government's return. *See* Tr. 44:3-46:21. Neither the government nor its supporting amici have previously relied on those cases, and for good reason: the cases do nothing to rebut the clear historical evidence that habeas courts before 1789 allowed persons detained by the executive without criminal process to challenge the factual basis for their confinement.[1] Both cases relied squarely on unique emergency legislation passed by Parliament at the outset of World War II that allowed broad detention, and both cases are widely viewed today as discredited.

Liversidge was a damages action for false imprisonment that turned on the interpretation of Defence (General) Regulation 18B, which was promulgated under the authority of the Emergency Powers (Defence) Act, 1939. That statute authorized regulations "'for the detention of persons whose detention appears to the Secretary of State to be expedient in the interests of the public safety or the defence of the realm'" ([1942] A.C. at 212 (Viscount Maugham) (citation omitted)), and the regulation in turn authorized the detention of anyone whom the Home Secretary "'ha[d] reasonable cause to believe'" was "'of hostile origin or associations'" or otherwise a threat to the realm (*id.* at 207 n.1 (citation omitted)). A majority of the Law Lords read this language to authorize a person's detention if the Home Secretary *subjectively* believed there was reasonable cause for detention. *See id.* at 220 (Viscount Maugham); *id.* at 253-257 (Lord Macmillan); *id.* at 265 (Lord Wright); *id.* at 278-279 (Lord Romer). The Lords explained that, under this

[1] Two amici supporting Petitioners referred in passing to the dissenting opinion in *Liversidge*, which, as explained below (pp. 2-3), is now universally viewed in the British legal system as authoritative. *See* 38 U.K. & Eur. Parliamentarians Amicus Br. 3; Commonwealth Law. Ass'n Amicus Br. 27.

construction, they had no reason to consider whether the appellant's detention was objectively supported by reasonable cause. *See, e.g., id.* at 224 (Viscount Maugham).

The Solicitor General was therefore incorrect to assert (at 46:2-21) that *Liversidge* spoke to the scope of the common law writ of habeas in 1789. Even putting aside the fact that *Liversidge* was not a habeas action, it is inapposite because the case interpreted a special emergency wartime statute and regulation (no longer in force in Britain and without analogue in the United States) to authorize detention based on one fact alone: the Secretary's subjective belief that there was reasonable cause to detain. In a system where "Parliament is supreme" ([1942] A.C. at 260 (Lord Wright)), no further factual inquiry was necessary to deny recovery of damages for false imprisonment. *See also id.* at 252 (Lord Macmillan) (stressing that the "abrogation in the public interest and at the absolute discretion of the Secretary of State of the ordinary law affecting the liberty of the subject" was expressly authorized by Parliament, and that "as indicative of the abnormal and temporary character of the legislation ... it is expressly limited in duration").

Of course, no U.S. statute authorizes Petitioners' detention based only on the subjective belief of an executive official that detention is appropriate. And even in Britain, the reasoning of *Liversidge* has been repudiated by several subsequent decisions, which have adopted the reasoning of Lord Atkin in dissent. Lord Atkin disagreed with the proposition that the emergency regulation permitted detention solely on the Home Secretary's subjective judgment and insisted that, even "amid the clash of arms," the judiciary must "stand between the subject and any attempted encroachments on his liberty by the executive, alert to see that any coercive action is justified in law." [1942] A.C. at 244. Lord Atkin further stated that "one of the pillars of liberty" in English law is that "every imprisonment is prima facie unlawful and that it is for a person directing imprisonment to justify his act." *Id.* at 245. As noted by [redacted] J. Sharpe, on whom the government also relies (*see* Br. 29, 39), "Lord Atkin's dissent has since been accepted as the correct view, and it has been held by the House of Lords that the

construction of [Regulation 18B] by the majority in *Liversidge* and *Greene* would not now be followed." Sharpe, *The Law of Habeas Corpus* 103 (2d ed. 1989).[2]

Greene, decided on the same day as *Liversidge* and relying on the same discredited interpretation of Regulation 18B, does not support the government's position either. Greene had been detained by the Home Secretary under the regulation and applied for habeas relief, claiming that he was not "'a person of hostile associations.'" [1942] A.C. at 286 (citation omitted). The Lords held, based on *Liversidge*, that "the production of the Secretary of State's order, the authenticity and good faith of which is in no way impugned, constitutes a complete and peremptory answer to the appellant's application." *Id.* at 297 (Lord Macmillan); *see also id.* at 290 (Viscount Maugham); *id.* at 305-306 (Lord Wright); *id.* at 309 (Lord Romer). The denial of habeas relief was not due to any inability on the petitioner's part to traverse the return; on the contrary, Viscount Maugham observed that "'where on the return an order or warrant which is valid on its face is produced *it is for the pris-*

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[2] *See Khawaja* v. *Secretary of State for the Home Dep't*, [1984] A.C. 74, 110 (H.L.) (Lord Scarman) ("The classic dissent of Lord Atkin in *Liversidge* v. *Anderson* is now accepted as correct not only on the point of construction of regulation 18(b) of the then emergency Regulations but in its declaration of English legal principle." (citations omitted)); *id.* at 122 (Lord Bridge of Harwich) ("Lord Atkin's dissent now has the approval of your Lordships' House[.]"); *Inland Revenue Comm'rs* v. *Rossminster Ltd.*, [1980] A.C. 952, 1011 (H.L. 1979) (Lord Diplock) ("[T]he majority of this House in *Liversidge* v. *Anderson* were ... wrong and the dissenting speech of Lord Atkin was right."); *id.* at 1025 (Lord Scarman) ("The ghost of *Liversidge* ... need no longer haunt the law[.] It is now beyond recall."); *Nakkuda Ali* v. *Jayaratne*, [1951] A.C. 66, 76 (P.C. 1950) ("[I]t would be a very unfortunate thing if the decision of *Liversidge*'s case came to be regarded as laying down any general rule as to the construction of such phrases when they appear in statutory enactments," (footnote omitted)); *see also R.* v. *Secretary of State for the Home Dep't*, [2006] Q.B. 359, 374 (McCombe, J.) (describing Lord Atkin's statements in dissent as a "cornerstone of [the] common law"); *Chandler* v. *Director of Pub. Prosecutions*, [1964] A.C. 763, 811 (H.L. 1962) (Lord Devlin) (describing the majority reasoning in *Liversidge* as an "exegesis of an emerg[ency] regulation" and not a statement "of the common law"); *Ridge* v. *Baldwin*, [1964] A.C. 40, 73 (H.L. 1963) (Lord Reid) (describing *Liversidge* decision as "very peculiar").

owe to prove the facts necessary to controvert it.'" *Id.* at 295 (emphasis added) (quoting lower court opinion). Rather, the point was that the evidence filed by the petitioner was immaterial under the regulation because "'it in no way shows that the Secretary of State had not reasonable cause to believe, *or did not believe*, otherwise.'" *Id.* (emphasis added). Accordingly, the facts before the court—including the petitioner's evidence—sufficed to permit detention under the governing emergency regulation as the court construed it.

As in *Liversidge*, the court in *Greene* did not—and had no reason to—state a general rule that the executive's factual assessments were beyond scrutiny. Rather, the court concluded that, in light of its construction of the regulation, "[t]he only possible inquiry of fact, when once the authenticity of the order and its application to the appellant is conceded or established, is whether the Home Secretary had in his own mind what appeared to his mind to be reasonable cause." [1942] A.C. at 307 (Lord Wright). And because the petitioner (understandably) had no basis to contest the Home Secretary's subjective belief, "[i]n the present case there are no facts to inquire into." *Id.* Yet investigation of facts beyond the return would have been appropriate had there been a dispute as to the authenticity of the Secretary's order or the identity of the prisoner. *See id.* at 306-307; *R.* v. *Secretary of State for Home Affairs ex parte Budd*, [1942] 2 K.B. 14, 22 ("It is clear that there may be many matters into which the court can and will inquire ..., for example, the bona fides of the Secretary of State, the genuineness of the detention order itself, and the identity of the applicant with the person referred to in the order."); Sharpe 101-102 (stating that the court could go behind the Secretary's order if "the prisoner could show lack of *bona fides*" and that the Secretary's good faith could be "attacked by evidence").

Although the decision in *Greene* depended wholly upon the construction of Regulation 18B and the petitioner's failure to challenge the veracity of the Secretary's statement of belief, two of the five Lords discussed the common law writ in dictum. *See Greene*, [1942] A.C. at 291-294 (Viscount Maugham); *id.* at 302-303 (Lord Wright). Viscount Maugham's discussion relied heavily on a 1758 opinion by Sir John Eardley Wilmot, during a

debate on an unsuccessful habeas bill, for the proposition that common law habeas courts could not look beyond the facts stated in the return. *Id.* at 292-293. As discussed in prior briefing, that proposition does not accurately reflect the common law. Limitations on traversing the return principally applied in post-conviction criminal cases, not in cases of noncriminal executive detention such as this one. *See, e.g.*, Oaks, *Legal History in the High Court—Habeas Corpus*, 64 Mich. L. Rev. 451, 454 n.20 (1966) (cited at Pet. Br. 19) ("With respect to imprisonments other than for criminal matters, however, the exceptions to the rule against controverting the return were 'governed by a principle sufficiently comprehensive to include most ... cases' so that it was 'impossible to specify those [noncriminal cases] in which it could not [be controverted].'" (quoting Hurd, *A Treatise on the Right of Personal Liberty and on the Writ of Habeas Corpus* 271 (2d ed. 1876)) (alterations in Oaks)); Legal Historians Amicus Br. 17-26; Sharpe 65-66.

To the extent Wilmot perceived broader limitations on the traverse in noncriminal cases, his position did not represent the majority view. *See* Legal Historians Amicus Br. 18-20; Sharpe 66 & nn.15-16. Indeed, courts in England and America regularly permitted habeas petitioners detained without trial to present evidence, which was reviewed neutrally. *See* Pet. Br. 21-24; Legal Historians Amicus Br. 20-29; Sharpe 66-67 (noting that Wilmot himself "admit[ted] that in practical terms," any stricture against traversing the return "was narrow, and that questions of fact could often be entertained").

The Solicitor General's new authorities thus do not support the government's argument that Petitioners could not have traversed the return at common law. On the contrary, as Petitioners explained in their earlier briefs, common law courts clearly could and did receive evidence from petitioners demonstrating that the detention was unlawful. Accordingly, the Court should reject the Solicitor General's suggestion that the common law writ of habeas corpus protected by the Suspension Clause, U.S. Const., art. I, § 9, cl. 2, did not allow a habeas petitioner to controvert the factual basis of the government's asserted ground for detention where the prisoner was not detained pursuant to a criminal conviction.

Respectfully submitted.

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